Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-409

ROBERT J. CAHILL,
Appellant

v.

GOVERNMENTAL ETHICS COMMISSION
Appellee

On Appeal from the Supreme Court
of the State of Kansas

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT

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MOTION TO DISMISS OR AFFIRM

Appellee, Governmental Ethics Commission, hereby moves the Court to dismiss so much of the appeal herein as relates to the constitutionality of K.S.A. 25-4118 and 25-4124 since issues raised thereby were not timely or properly raised nor expressly passed on by the Supreme Court of the State of Kansas.

Appellee further moves that the entire appeal be affirmed on the grounds that the questions presented are wanting in any substance due to previous decisions of this Court.

Respectfully submitted,

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BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

I. Whether K.S.A. 25-4118 and 25-4124 are unconstitutional as applied by the State of Kansas and as construed by the Supreme Court of Kansas.

In the appeal of this matter to the Kansas Supreme Court, the issues presented were framed by the Appellant as follows:

(1) Is the written grant of immunity tendered the witness Cahill coextensive with the scope of the constitutional privilege against self-incrimination?

(2) Can Cahill be required to answer the questions put to him by counsel for the Commission in violation of his First Amendment rights?

(3) Did the trial court have jurisdiction to punish Cahill for contempt?

As may be seen from a review of appellant's stated issues on appeal to the Kansas Supreme Court, any contention concerning the constitutionality of K.S.A. 25-4118 and 25-4124 is lacking. A review of appellant's brief therein discloses no arguments on the constitutionality of these statutes nor does the Court's opinion indicate that it ever expressly passed thereon.

The above issue should be dismissed pursuant to U.S. Sup. Ct. Rule 16(1) (6), 28 U.S.C., as the issue was not properly raised nor expressly passed upon. *Neely v. Martin K. Ebby Construction Co.*, 386, U.S. 317, 87 S. Ct. 1072, 18 L.Ed. 2d 75 (1967).

II. Whether appellant was denied his rights of association under the First and Fourteenth Amendments in an inquiry by the State into his political associations and beliefs.

Regardless of the resolution of appellee's motion to dismiss, this case should be affirmed as it presents questions wanting in substance due to prior decision of this Court.

As to factual background, the appellant notes in his jurisdictional statement that he was subpoenaed to give testimony before the Governmental Ethics Commission regarding a complaint filed before the Commission which alleged that his mother-in-law had failed to file a report of independent campaign expenditures as required by K.S.A. 25-4110 in the 1976 race for the office of District Attorney of Wyandotte County, Kansas.

K.S.A. 25-4110 states as follows:

> Every person, other than a candidate or a candidate committee, party committee or political committee, who makes contributions or expenditures, other than by contribution to a candidate or a candidate committee, party committee or political committee, in an aggregate amount of one hundred dollars ($100) or more within a calendar year shall make statements containing the information required by K.S.A. 1975 Supp. 25-4108, and file them in the office of the secretary of state so that each such statement is in such office on the day specified in K.S.A. 1975 Supp. 25-4108. Reports made under this section need not be cumulative.

That section has been interpreted and implemented by the Commission in K.A.R. 19-21-5 as follows:

> Every person, other than a candidate or a candidate committee, party committee or political committee, who makes independent contributions or expenditures other than by contribution to a candidate or a candidate committee, party committee or political committee, in an aggregate amount of one hundred dollars ($100) or more within a calendar year shall make verified statements containing the information required by K.A.R. 19-29-2 on forms prescribed and provided by the commission, and file them in the office of the secretary of state so that each such statement is in such office on the day specified in K.A.R. 19-28-1. Reports made under this section need not be cumulative. For the purposes of this section "independent contributions and expenditures" means contributions or expenditures made without cooperation or consent of the candidate or committee intended to be benefited thereby and which expressly advocate the election or defeat of a clearly identified candidate.

Returning to the factual situation, appellant recognizes that the subpoena to him was issued after a probable cause determination by the Commission and he was compelled to testify by the District Judge of Shawnee County, Kansas, only after being granted immunity which was found by the Kansas Supreme Court to be co-extensive with the appellant's Fifth Amendment rights.

The appellant's mother-in-law lived with the appellant and signed and distributed certain campaign materials which expressly advocated the defeat of a clearly identified candidate. Appellant produced the materials and pick-up envelopes from a vendor which had been ordered by the candidate benefited by the mailings and which were apparently used for the mailings.

At issue then is whether forced disclosure pursuant to a grant of immunity concerning independent campaign expenditures violates the First and Fourteenth Amendments. This Court has already ruled on the issue.

N.A.A.C.P. v. Alabama, 357 U.S. 449, 78 S. Ct. 1163, recognized that in certain situations public disclosure of associational ties could prevent free exercise of First Amendment rights. This result would be obtained where public disclosure could adversely effect an important demonstrated interest.

However, it is clear that neither the right to associate nor the right to participate in political activities is absolute (*Civil Service Commission v. Letter Carriers*, 413 U.S. 548). Indeed, even a significant interference with protected association may be sustained if the state demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms (*Cousins v. Wigoda*, 419 U.S. 477, 95 S. Ct. 541, *Shelton v. Trucker*, 364 U.S. 479, 81 S. Ct. 247).

The application of the above tests to reporting of independent contributions and expenditures has already been resolved at the federal level in *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612. There, this Court recognized several

important interests involved generally in the requiring of the reporting of campaign contributions and expenditures (see *Buckley v. Valeo*, 424 U.S. at 67, 68). More importantly, this Court went on to find 18 U.S.C. §434(e) (the companion at the federal level to K.S.A. 24-4110) was further supported by such important governmental interests as being responsive to the legitimate fear that efforts would be made, as they had in the past, to avoid disclosure by routing financial support of candidates through avenues not covered by other provisions, and providing for full disclosure as a maximum deterrence for corruption and undue influence (*Buckley v. Valeo*, 424 U.S. at 76). On these grounds, this Court held that 18 U.S.C. §434 when construed narrowly was constitutionally sound.

Since K.S.A. 25-4110 as interpreted by K.A.R. 19-21-5 are parallel in all pertinent aspects to 18 U.S.C. §434 as interpreted in *Buckley v. Valeo*, 424 U.S. at 80, 81, 82, there remains no substantial issue regarding the application of the First Amendment to the disclosures required in this case. The case should be affirmed. *Missouri Pacific R. Co. v. Castle*, 224 U.S. 541, 32 S. Ct. 606, 56 L.Ed. 875 (1912).

Should there be any lingering questions, it should be noted that appellant failed at the trial level and on appeal to raise any demonstrated facts which would indicate an adverse effect by disclosure. *Governmental Ethics Commission v. Cahill*, 225 Kan. 772, 779, ____ P. 2d ____ (1979). Having failed to raise such issues, appellant is foreclosed from attempting to do so here. *Neely v. Martin K. Ebby Construction Co.*, 386, U.S. 317, 87 S. Ct. 1072, 18 L.Ed. 2d 75 (1967). Without such a demonstration, appellant cannot prevail. *Buckley v. Valeo*, 424 U.S. at 69.

CONCLUSION

For the reason set forth above, the appeal should be dismissed as to the first allegation or in the alternative the judgment of the Supreme Court of Kansas should be affirmed in all respects.

Respectfully submitted,

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